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In the Supreme Court of the United States

OCTOBER TERM, 1981

CENTURY FOREST INDUSTRIES, INC., Petitioner

VS.

DURAWOOD TREATING COMPANY, DIVISION OF ROY O. MARTIN LUMBER COMPANY, INC., Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JAMES R. CORNELIUS, JR.
ZELESKEY, CORNELIUS, ROGERS, HALLMARK & HICKS
P.O. Drawer 1728
Lufkin, Texas 75901
(713) 632-3381

FLOURNOY, DEATON & STEPHENS
P.O. Box 1546
118 South Second
Lufkin, Texas 75901

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-6888

QUESTIONS PRESENTED

The question presented is whether the Texas Statute of Frauds, V.T.C.A. Bus. & C. §§2.201(a,b) (U.C.C.§§2.201 (1,2) prevents proof of an alleged oral Contract where the only writing existing between the parties is a letter from the party seeking to enforce the Contract, which letter confirmed a conversation and placed an order. More specifically, the Court is asked whether the "confirmatory writing" exception to the Statute of Frauds must stand on its own and be a legally enforceable contract or whether the Court may look behind such writing to infer the existence of a contract.

LIST OF PARTIES

The Parties involved in this proceeding are:

CENTURY FOREST INDUSTRIES, INC., Petitioner

and

DURAWOOD TREATING COMPANY, DIVISION OF ROY O. MARTIN LUMBER COMPANY, INC., Respondent

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STATEMENT OF JURISDICTION

The opinion of U.S. Court of Appeals for the Fifth Circuit (Appendix A, infra, page A-6) was entered on May 14, 1982. The jurisdiction of the Supreme Court is invoked under 28 USC 1254(1).

Additionally, pursuant to Rule 17.1 of the Supreme Court Rules, the writ should be granted because a federal court of appeals has rendered a decision in conflict with decision of another federal court of appeals on the same matter.

STATUTE INVOLVED

This case involves the Statute of Frauds provision of the Uniform Commercial Code as adopted by Texas in Vernon's Texas Code Annotated, Business and Commerce Code §§2.201(a,b).

OPINIONS BELOW

The opinion of United States District Court for the Eastern District of Texas was unreported and the Findings of Fact and Conclusions of Law entered therein are printed in Appendix A hereto, infra, page A-1. The Journal Entry of Judgment of U. S. District Court for the Eastern District of Texas, Marshall Division, is printed in Appendix A hereto, infra, page A-5. The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, infra, page A-6.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

*****

CENTURY FOREST INDUSTRIES, INC., Petitioner

VS.

DURAWOOD TREATING COMPANY, DIVISION OF ROY O. MARTIN LUMBER COMPANY, INC., Respondent

*****

PETITION FOR A WRIT OF CERTIORARI TO U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Century Forest, Inc., the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of U.S. Court of Appeals for the Fifth Circuit entered in the above-entitled case on May 14, 1982.

STATEMENT OF CASE

This is a diversity case brought by Durawood Treating Company, Division of Roy O. Martin Lumber Company, Inc. (hereinafter called Durawood) alleging a breach of contract by Defendant Century Forest In-

dustries, Inc. (hereinafter called Century) The contract sought to be enforced was an alleged oral agreement between representatives of both parties. After the alleged agreement between the parties, a representative of Durawood sent to Century a letter dated April 5, 1978 which in full stated:

> Confirming our conversation, please enter our order for 20,000 6x8 - 8'6" No. 3 hardwood ties at $8.60 each. These are to be treated with creosote coal tar solution.
>
> We will advise instructions just as soon as we get some releases on the job.

Century made no response to this letter and nothing took place concerning the matter for several months. Some months later Century indicated to Durawood that it would not be able to ship that order referred to in Durawood's letter of April 5, 1978 and subsequently on August 29, 1978 Century stated to Durawood in writing that fact.

Durawood demanded that Century fulfill the purported contract, and when Century refused this suit was filed.

(a) *The Rulings Below*

The U. S. District Court for the Eastern District of Texas, Robert M. Parker presiding, found that Century entered into an oral contract which was not barred by the Statute of Frauds since Durawood's letter of April 5, 1978

confirmed the contract as required by §§2.201 of the Texas Business and Commerce Code. The District Court entered judgment in favor of Durawood for the sum of $100,000.00 representing purported damages and lost profits and for $2,100.00 as attorney's fees as stipulated by the parties.

The United States Court of Appeals for the Fifth Circuit affirmed the existence of a legally enforceable contract but reversed in part the damage award.

(b) *Opinion Below*

The Court of Appeals, while recognizing the basic rule of contracts that an offer—standing alone—is not an enforceable contract, held that the letter of April 5, 1978 was more than a simple offer to enter into a contract. The Court relied on comment 1 to §§2.201 which states that in order to satisfy the Statute of Frauds, "all that is required is that the writing afford a basis for believing that the offered oral evidence rest on a real transaction". The Court held in its opinion that since the letter indicated it was sent as confirmation of a previous conversation, that it *implicitly* set out that, as a result of the previous conversation, Durawood has followed through on its obligation and was confirming the oral contract by placing a written order for the goods discussed in the earlier conversation". (emphasis supplied)

Such decision of the Court of Appeals is clearly in conflict with the decisions of other United States Courts of

Appeals and essentially takes the teeth out of the Statute of Frauds.

REASONS FOR GRANTING THE WRIT

This case concerns the integrity and the validity of the Statute of Frauds as codified by U.C.C. §§2.201. The decision of the United States Court of Appeals for the Fifth Circuit conflicts with the decision of other Federal Courts of Appeals on the same matter.

The purpose of the Statute of Frauds is to safeguard the integrity of written instruments and thus require a written memorandum signed by the party to be charged as evidence of the obligation that is to be enforced against him.

§§2.201 of the U.C.C. (V.A.T.C. Bus. and Comm. Code §§ 2.201) states in pertinent part

> (a) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

> (b) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of Subsection (a) against such party unless written notice of objection to its contents is given within ten days after it is received.

The Court of Appeals' interpretation of §§2.201(b) in the case at bar results in allowing that section to set forth a less stringent requirement than §§2.201(a). The Fifth Circuit's action in effect removes the protection for which the Statute of Frauds was designed.

In the case at bar, Century was saddled with the obligation of a contract and charged with the breach thereof. The only notice on which Century had to rely was the April 5, 1978 letter by Durawood which stated in pertinent part "confirming our conversation, please enter our order ..." There was nothing to put Century on notice that Durawood was claiming there was contract between the parties. There was nothing to put Century on notice that it had to take affirmative steps to deny the existence of that contract. The letter sent by Durawood had no language which would alert Century that this letter was something other than an order placed in accordance with usual business practices. The letter on its face confirmed that there had been a conversation and then placed an order.

In *R. S. Bennett and Company, Inc. vs. Economy*

Mechanical Industries, Inc. 606 F.2d. 182 (7th Cir., 1979) the Court of Appeals in considering Plaintiff's argument that §§2.201(b) was less stringent than §§2.201(a) stated that the purpose of §§2.201(b) was to make memos of a contract that would be binding on the sender under 2.201(a) equally binding on the party receiving the memo in absence of objection. The Court emphasized that the writing itself must satisfy the requirements of both §§2.201(a) and §§2.201(b). The Court refused to consider evidence of intent behind the memos because to allow such would permit evidence on the issue and would result in the anomalous sequence of offering proof of an oral contract to explain the writing, thus removing the bar of the Statute of Frauds so that proof again can be offered on the oral contract. The Court stated that the purpose of the Statute was to afford the trier of fact something reliable to go on in addition to mere oral testimony of the Plaintiff.

Therefore, a confirmatory writing must stand on its own. The Court may not imply what was meant by the writing nor what Century should have thought when it received the letter, but must look solely to the writing and see whether or not the requirements of a contract are present as required by §§2.201(a).

The Plaintiff in *Bennett, supra.* at 196, unsuccessfully made the same argument that "evidence of intent in sending a particular document and the understanding of the Defendant upon receiving are substantial questions of fact which will determine whether the requirements of

§§2.201(2) have been satisfied to remove the Statute of Frauds". The Court disagreed and refused to admit evidence of intent stating:

> The purpose of the Statute is to afford the trier of facts something reliable to go on in addition to the mere oral understanding of the Plaintiff. ***To permit the Plaintiff to bolster the written evidence with oral testimony ... would strip the Statute of its essential protective purpose.

In *Doral Hosiery Corporation vs. Sav-A-Stop, Inc.*, 377 F.Supp. 386 (E.D.Pa. 1974) the Court stated that a writing need not expressly state that it is sent in confirmation of a prior transaction, but must state that a binding completed transaction has been made.

The Court in *Alice vs. Robert Manufacturing Company* 358 F.Supp. 1377 (N.D.Ga. 1970) *aff'd. per curiam* 445 F.2d. 316 (5th Cir. 1971) additionally there held that the confirmatory memorandum must meet the same requirements as a writing under the Georgia equivalent of §§2.201(a); i.e. among other things, it *must* evidence a contract for the sale of goods (emphasis supplied).

The confirming memorandum must inform the recipient that the sender is claiming that a binding contract is in existence. Durawood's letter does not meet this requirement. Durawood's letter was simply a confirmation of a prior conversation and an entry of an order. There was nothing in this letter to evidence that a contract has been entered into by the parties. Because of

the insufficiency of Durawood's letter, the exception to the Statute of Frauds does not apply and Durawood should have been barred from presenting evidence of an oral contract. The District Court's admission of this evidence was clearly erroneous and the U. S. District Court of Appeals for the Fifth Circuit should have reversed this decision.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

DATED August 5, 1982.

Respectfully submitted,

ZELESKEY, CORNELIUS, ROGERS,
HALLMARK & HICKS
P.O. Drawer 1728
Lufkin, Texas 75901
(713) 632-3381

ATTORNEYS FOR PETITIONER

By: _____
James R. Cornelius, Jr.
State Bar No. 04834000

CERTIFICATE OF SERVICE

I, James R. Cornelius, Jr. do hereby certify that on this _____ day of August, 1982, a true and correct copy of the above Petition for Writ of Certiorari was mailed to opposing counsel by depositing the same in the custody of the United States Postal Service in a postage paid wrapper.

_____

James R. Cornelius, Jr.